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No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

MALCOLM T. ARENBURG, JR.,
Petitioner,

v.

FARMHOLME, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT, STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

MALCOLM T. ARENBURG, JR., Petitioner

v.

FARMHOLME, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT, STATE OF CONNECTICUT

To the Chief Justice and Associate Justices of the Supreme Court of the United States.

MALCOLM T. ARENBURG, JR., Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Appellate Court, State of Connecticut, entered in the above-entitled case on June 12, 1987.

Questions Presented

1. In an action for conspiracy, fraud, breach of contract, quantum meruit and negligence, tried before a state referee acting as a Court, did the Appellate

Court violate the First and Fifth Amendments, through the Fourteenth Amendment to the Constitution of the United States, when it denied a motion to order the inclusion in the printed record of certain items contained in a Designation of Contents of Record?

2. Did the Appellate Court err when it failed to find that the lower court violated the First and Fifth Amendments, through the Fourteenth Amendment to the Constitution of the United States, when it taxed expenses in favor of Respondent FARMHOLME, INC. pursuant to Connecticut Practice Book Sec. 111 and Connecticut General Statutes Sec. 52-99?

List of Parties

The parties to the proceeding in the Appellate Court are MALCOLM T. ARENBURG, JR. (hereinafter Plaintiff), and FARMHOLME, INC. (FI), JOHN W.S. MCCORMICK, DEBRA J. GRIFFIN aka DEBRA J.

SAUCIER, LEWIS J. PAYTON and ALBERT G. MURPHY (hereinafter Defendants).

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Opinions Below

The opinions of the Appellate Court, State of Connecticut, are reported in 11 Conn.App. 810, 526 A.2d 1352, and 6 Conn. App. 142, 503 A.2d 628. The opinions of the Superior Court of Connecticut are unreported.

Jurisdiction

The judgment of the Appellate Court, State of Connecticut, was entered on June 12, 1987. A timely Petition for Certification to appeal to the Supreme Court of Connecticut was denied on July 30, 1987. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1257.

Constitutional Provisions, Statutes and Practice Book Sections Involved

Constitution of the United States, Amendments I, V and XIV; Connecticut General Statutes (C.G.S.) Secs. 52-99 and 52-257; Connecticut Practice Book (P.B.) Secs. 111, 2000, 3060F and 3096.

Statement of Case

In late 1976, Defendant JOHN W.S. MCCORMICK came to know Defendant LEWIS J. PAYTON. At that time said Defendants became friends. At the time, Defendant MCCORMICK became interested in a large estate called Farmholme in Stonington and told Defendant PAYTON about it. By agreement of said Defendants, Defendant MCCORMICK or VTP signed a contract to buy Farmholme for $300,000. During the next six months, Defendant MCCORMICK consulted with Defendant PAYTON concerning Farmholme. Farmholme was intended to be a home for Defendant MCCORMICK and his family. Some time after the purchase agreement was signed, said Defendants orally agreed concerning the occupancy of Farmholme by Defendant MCCORMICK and his family. Defendant MCCORMICK was to have life use of the main house and buildings. Eventually the main house and buildings might be

turned over to said Defendant after a number of years. He was to pay all the bills, including those for the mortgage, taxes, caretaker, insurance, fuel, repairs and improvements. Defendant MCCORMICK was in financial trouble related to his family and siblings (including some large notes from his father), which had been building up over a tobacco business for years. He had some large judgments against him. Defendant MCCORMICK retained the law firm of Longolucco and Lenihan in Westerly, Rhode Island. One of said Defendants asked them to arrange the formation of a corporation. The corporation was to be formed on behalf of Defendant MCCORMICK to take title to Farmholme. The attorneys made a decision and Defendant MCCORMICK met Defendant ALBERT G. MURPHY. Defendant MURPHY formed the corporation called Farmholme, Inc. and filed the Certificate of Incorporation. Defendant MURPHY's secretary, Defendant

DEBRA GRIFFIN, also known as Debra Saucier, was President and Director. Defendant MURPHY was Secretary, Director and Statutory Agent continuously since June 29, 1977. There were no other directors on that date. Defendant GRIFFIN never resigned as President or Director, orally or in writing. No shares of stock were ever issued. Defendant PAYTON had no knowledge of consideration being paid for shares of stock in Defendant FI. Defendant MCCORMICK was not a shareholder, officer or director of Defendant FI. Defendant PAYTON was aware of no meetings or minutes of meetings of shareholders or directors of Defendant FI. On June 30, 1977, Defendant MCCORMICK came into Defendant PAYTON's office and said, "We have to close on Farmholme; the boys in Westerly have formed a corporation and you're going to have to be President; let's go." And they soon went. On June 30, 1977, Defendant FI purchased Farmholme for $300,000. On that

date, Defendant FI, acting by Defendant PAYTON, who signed as and acknowledged himself to be President "duly authorized," executed mortgages on the premises to The Washington Trust Company of Westerly, Rhode Island for $240,000 and to Thomas and Anna Jean Collings for $40,000. Defendants PAYTON, as President of Defendant FI, and MCCORMICK signed a mortgage note to The Washington Trust Company. Defendant MCCORMICK did so as a guarantor. Defendant PAYTON knew he was not "duly authorized" as President of Defendant FI but served as such and acknowledged himself to be such. He never met with any directors of Defendant FI and was not present at any election of him by the directors. He didn't know the names of any directors, shareholders or other officers of Defendant FI. He gave no proof to the person who took the acknowledgment of the mortgage deeds that he was President of Defendant FI. The bank didn't demand any

documents concerning a vote of authority by the directors regarding the purchase and there were no such documents. Defendant PAYTON signed as President "duly authorized" because Defendant MCCORMICK had asked him to. Defendant PAYTON had no knowledge of the assets of Defendant FI immediately prior to the purchase and mortgage of Farmholme. Immediately prior to the closing, Defendant FI had no assets. Defendant PAYTON signed signature cards for a corporation account in the Westerly area for checks drawn by Defendant FI to be signed by Defendant MCCORMICK as an officer. Defendant PAYTON never supervised the account. There was no income to Defendant FI beyond that for expenses related to Farmholme. Defendant PAYTON did not insist of Defendant MCCORMICK that money be paid to Defendant FI and then Defendant FI would make necessary

payments. Defendant MCCORMICK never made payment to Defendant FI with regard to occupancy of Farmholme. Defendant PAYTON knew of no mortgage payments to Mr. or Mrs. Collings related to Farmholme. Defendants MCCORMICK and PAYTON agreed that Defendant MCCORMICK had authority to run and was totally responsible for everything that happened at Farmholme. No officer of Defendant FI supervised the activities of Defendant MCCORMICK at Farmholme. There were no day to day affairs of Defendant FI because essentially it existed to hold Farmholme.

Defendant MCCORMICK signed labor and materials contracts for the property in his name only. He was going to get the benefits of the contracts by living in the house. The bank mortgage payments were due on the 30th of each month beginning July 30, 1977. Shortly prior to October 25, 1977, Defendant MCCORMICK saw Plaintiff working daily on a

building. Defendant MCCORMICK described to Plaintiff property which he said "I have down in Stonington." Defendant MCCORMICK said that he had recently purchased some sizable property called Farmholme in Stonington. Late in the week Defendant MCCORMICK gave Plaintiff directions and on Saturday Plaintiff went to inspect the premises. Plaintiff was impressed by the estate. Defendant MCCORMICK told Plaintiff that he expected to live at Farmholme a long time.

On October 25, 1977, Plaintiff contracted in writing with Defendant MCCORMICK, as owner, for Plaintiff to do aluminum siding and exterior masonry cleaning and siliconing at Farmholme for a total of $2,235.00, plus reasonable interest, legal, and collection fees. On that date, title to the property was in Defendant FI. Defendant MCCORMICK never told Plaintiff that he was acting as agent for anyone. Plaintiff performed

the contracted work on the main house which, in part, slowed down deterioration of the building and, in part, beautified it. Defendant MCCORMICK who was present a couple of times during the week Plaintiff performed the work, gave Plaintiff a tour and told him he was preparing it to move his family in. Plaintiff relied on representations of Defendant MCCORMICK that he was the owner. Plaintiff would not have signed the contracts and performed them had he had any doubts that Defendant MCCORMICK was the owner of the building. Plaintiff contacted Defendant MCCORMICK on numerous occasions for payment. Defendant MCCORMICK told Plaintiff that payment would be forthcoming. Plaintiff never filed any mechanic's lien because Defendant MCCORMICK continually told him next week, next week. Defendant MCCORMICK never paid Plaintiff for the

work.

Defendant MCCORMICK made three mortgage payments to the bank and then Defendant FI defaulted. The bank foreclosed on Farmholme.

In the spring of 1978, Plaintiff examined the land records of the Town of Stonington and discovered that the record owner of Farmholme was Defendant FI. Plaintiff had never heard of Defendant FI until he went to Stonington Town Hall.

As counsel for Defendants MCCORMICK and FI on May 4, 1979, Defendant MURPHY represented to the Court that Defendant MCCORMICK was the prime stockholder of Defendant FI. On September 6, 1979, Defendant PAYTON signed a deed regarding Farmholme from Defendant FI to Sergio Franchi and Edward Traubner as President "duly authorized." The foreclosure was paid off in 1979.

On November 3, 1983, Defendant PAYTON

testified that he had not been convicted of a felony.

On November 4, 1983, he did not have in his possession or control any documents related to Defendants MCCORMICK or FI. On that day, Defendant PAYTON testified he never received copies of pleadings or papers in litigation involving Defendant FI. He admitted that in his Answer and in sworn Answers to Interrogatories he claimed that the only office he held in Defendant FI was that of President. He admitted that in sworn Answers to Interrogatories he stated that Defendant MCCORMICK had first consulted with him concerning Defendant FI in September 1977. Defendant FI had pursued a case to the Connecticut Supreme Court claiming its sale to Franchi was an equitable mortgage; a decision in the case had come down a few months before November

1983.

By writ dated June 18, 1980, Plaintiff commenced an action alleging, as amended, breach of contract, quantum meruit, conspiracy, fraud and neglience. In essence, the Complaint, as amended, alleges that Defendant MCCORMICK, individually or on behalf of Defendant FI, madelabor and materials contracts with Plaintiff; Defendant MCCORMICK falsely represented that he owned the premises actually owned by Defendant FI; in reliance thereon Plaintiff performed work benefiting said Defendants; Defendant FI was a sham corporation organized by and for the benefit of Defendant MCCORMICK; individual Defendants conspired with and/or knowingly or negligently participated with Defendant MCCORMICK in the organization and management of Defendant FI; Defendant MCCORMICK used Defendant FI to defraud Plaintiff;

Defendant FI was negligent in that it failed to properly investigate the background and reputation of Defendant MCCORMICK and each other Defendant, failed to properly oversee the activities of Defendant MCCORMICK at Farmholme, Stonington, Connecticut, improperly placed Defendant MCCORMICK in a position where he could engage in fraudulent activities with impunity and failed to properly warn present and future creditors of Defendants MCCORMICK and FI of the risks of dealing with Defendant MCCORMICK; Plaintiff was not paid; and as a result of the acts of Defendants, Plaintiff was damaged.

On April 6, 1981, Defendant MCCORMICK filed a Suggestion of Bankruptcy. On October 14, 1981, without opposition the Court granted Plaintiff's motion that the causes of action against Defendant MCCORMICK be separated from

the causes of action against the other Defendants for the purposes of further pleading and trial.

Throughout the pendency of this action and at trial, Defendant FI was represented by counsel. At the beginning of trial on November 3, 1983, Plaintiff's counsel stated that he was preceeding against all Defendants except Defendant MCCORMICK. He gave the order of witnesses as: Plaintiff, Defendant MURPHY, Defendant PAYTON and Defendant MCCORMICK.

During the direct examination by Plaintiff's counsel of Defendant MURPHY, the Court interrupted and ordered that Defendant MCCORMICK be placed on the stand. The Court further ordered the bifurcation of issues into agency, negligence and conspiracy. Plaintiff's counsel again stated that he was not proceeding against Defendant MCCORMICK,

but against all other Defendants.
The Court stated that the case would be over the next day.
On November 4, 1983, the Court stated that it was going to try to finish the case that day, if possible. During the direct examination of Defendant PAYTON by Plaintiff's counsel, the Court interrupted and solicited and apparently granted motions for nonsuit on the First Count. It then apparently granted motions for nonsuit in favor of Defendants MURPHY and GRIFFIN on all allegations. Counsel for Defendant PAYTON then moved for nonsuit on all allegations. Counsel for Plaintiff moved that the Court recuse itself. The Court denied that motion and immediately thereafter apparently granted the motion of Defendant PAYTON. The Court then denied Plaintiff's motion for a mistrial. Plaintiff marked for identification Exhibits U to AAAA.

The Court then stated that it was going to reserve judgment so that it could issue a memorandum on which an appeal could be predicated. It further stated that Plaintiff could have a hearing on relevancy of evidence if he requested it by December 1, 1983. Otherwise the Court would issue a memorandum in the first week of December specifying exactly what its decision is, the basis of it, so that Plaintiff could take it up with the Supreme Court. The hearing requested by Plaintiff was held on December 19, 1983. At that time, Plaintiff outlined various claims of law and made the following offers of proof based on documentary evidence and expected testimony, mainly from Defendants: Farmholme is a rather palatial 200 acre estate; the buildings on the premises include a main house, garage and freezer house, windmill, caretaker's house, barn,

chicken coop and guest house.

In or about May 1977, Defendant MCCORMICK consulted Attorney F. Thomas Lenihan. In turn, Attorney Lenihan contacted Defendant MURPHY to have Defendant MURPHY set up a corporation. When Defendant MCCORMICK went to The Washington Trust Company and Thomas and Anna Jean Collings for mortgage money, he told them that he was acting for Defendant FI. At the time he was seeking mortgage money to buy Farmholme, Defendant MCCORMICK had liquidated or was being required to liquidate his interest in six parcels of real estate in Connecticut and Massachusetts. One of the parcels was the home which he and his family had occupied for many years.

At Defendant MURPHY's direction, Defendant GRIFFIN typed out the incorporation papers for Defendant FI to be filed with the Secretary of State. The name for the corporation came from Attorney Lenihan.

Defendants MURPHY and GRIFFIN were the persons present at the incorporation meeting. Defendant GRIFFIN's prior business education and background was five years as a legal secretary. In the Certificate of Incorporation and Appointment of Statutory Agent for Service, Defendant GRIFFIN listed herself and signed as Incorporator "Debra J. Griffin." In the Organization and First Annual Report, she listed herself as President, Treasurer and Director "Debra J. Saucier," having a residence address at "172 A Homestead Street, Manchester, Conn." At the time, she actually resided at 5 Chestnut Street, Manchester, CT. Defendant GRIFFIN listed Defendant MURPHY as Secretary and the other Director and he signed as President and then crossed the title out and changed it to Secretary. In the report, Defendant MURPHY listed the address of the corporation's principal office at Farmholme, Hinkley Hill

Road, Stonington, CT. Defendant MURPHY stated under penalties of false statement that 5,000 shares of common stock at $1.00 par value had been issued and outstanding and that there was no amount still payable on said shares. He well knew that no shares had been issued, no consideration had been paid for any shares and there were no shareholders. The incorporation papers were dated and filed at 4:20 p.m., June 29, 1977.

Defendants MURPHY and GRIFFIN did not pass any corporate resolution to purchase Farmholme or any other real property. The board of directors had never elected Defendant PAYTON to any office. Immediately prior to the purchase and mortgage of Farmholme, Defendants MURPHY, GRIFFIN and FI had no knowledge of the assets of Defendant FI.

The directors of Defendant FI did not authorize the opening of any specific

account in any financial institution. Defendants MURPHY, GRIFFIN and FI claim no knowledge of any oral lease that Defendant MCCORMICK was to pay mortgage payments of Defendant FI.

On February 10, 1978, counsel for The Washington Trust Company issued a foreclosure writ for Farmholme. Defendant MCCORMICK handled details of the defense of the foreclosure. He attempted to obtain financing.

On August 8, 1978, Defendant MURPHY wrote a letter in which he identified Defendant MCCORMICK as the owner of Farmholme. Defendants FI and MCCORMICK did not deny the allegations of the foreclosure complaint and in accordance with an affidavit of debt, the Court entered judgment of foreclosure for $259,414.55 plus costs and fees. On November 1, 1978, Defendant MURPHY received a bill for a corporation kit supplied by

Hartford Stamp Works for Defendant FI on September 27, 1978.

On February 1, 1979, Defendant MURPHY sent a letter addressed to Defendant MCCORMICK at Defendant FI. On or about February 9, 1979, the bank moved to amend the judgment of foreclosure on the ground that Defendants FI and MCCORMICK had failed to keep up insurance on the premises. Attached to the motion was a check from VTP, signed by Defendant MCCORMICK, returned for insufficient funds. Defendant MCCORMICK admitted to Defendant MURPHY that the grounds for the motion were true.

On April 19, 1979, Attorney Abraham A. Lubchansky sent a letter to Defendant MURPHY in which he spoke about the equity of Defendant MCCORMICK in Farmholme. Defendant MURPHY did not respond to Attorney Lubchansky, claiming that Defendant MCCORMICK had no equity in

Farmholme.

Defendant MURPHY received a copy of a letter dated May 3, 1979 from Attorney Richard A. Case addressed to "Farmholme, Inc. . . . Attention: Mr. John McCormick," related to obtaining new mortgage money for Farmholme. Defendant MURPHY did not instruct either Defendant MCCORMICK or Attorney Case not to use Defendant MCCORMICK's name in connection with Defendant FI.

On May 4, 1979, Defendant MURPHY told Judge Goldberg that Defendant MCCORMICK was going to acquire a considerable tract of tobacco land in Windsor, CT, and that he was going to realize $50,000 from the sale of a home in Windsor that he was willing to put up to settle the foreclosure action. Defendant MCCORMICK was expected in the foreclosure to keep Farmholme insured. On May 4, 1979, Defendant MCCORMICK represented to Judge Goldberg that he had $5,000,000 in personal liability insurance which extended to

everything he owned, including Farmholme. On June 5, 1979, Victoria T. McCormick, wife of Defendant MCCORMICK, drew a check in the amount of $1,400 to The Washington Trust Company from an account in the name of Defendant FI. On that date, she drew another check in the amount of $74.44 to the trust company from the same account. On or about July 26, 1979, Defendant MURPHY, as Statutory Agent for Defendant FI, received a writ from the law firm of Schatz & Schatz, Ribicoff & Kotkin, representing CBT, claiming that Defendant FI was a sham corporation and the alter ego of Defendant MCCORMICK. On August 10, 1979, Defendant MURPHY received a motion from CBT to intervene in the foreclosure action on the basis that Defendant FI was the alter ego of Defendant MCCORMICK. On August 31, 1979, Defendant FI filed its 1978 Annual Report, dated August 21, 1979,

with the Secretary of State. The report, signed by Defendant MURPHY, listed Defendant PAYTON as President, Treasurer and Director; and Defendant MURPHY as Secretary and Director; and continued to claim that the shares of the corporation were issued, outstanding and fully paid. Defendant MCCORMICK and his family continuously occupied Farmholme throughout at least September 6, 1979. In December 1979, Defendant MCCORMICK signed an application for credit as President of Defendant FI.

On December 12, 1979, Defendant FI filed its 1979 Annual Report, dated August 21, 1979, with the Secretary of State. The report, signed by Defendant MURPHY, listed Defendant PAYTON as President, Treasurer and Director; and Defendant MURPHY as Secretary and Director; and continued to claim that the shares of the corporation were issued, outstanding and fully paid.

On January 27, 1980, a check drawn on an account in the name of Defendant FI for $103.00 to Robert Conley was signed by Defendant MCCORMICK. On May 14, 1980, in a deposition in the case of Robert E. Conley v. John W.S. McCormick, pending before the Superior Court, Judicial District of New London, Defendant MCCORMICK testified that Defendant PAYTON owned all the stock of Defendant FI.

Prior to June 8, 1980, Defendant MCCORMICK was interviewed by Hartford Courant reporter William Cockerham. He told Cockerham that: he and his family were confined to their mansion at Farmholme; he was forced to go to Sergio Franchi to help save Farmholme from the auction block; he first met Franchi a year before after the bank foreclosed on the McCormick estate at Farmholme; "I was desperate and I needed private financing;" he needed $392,000 to keep Farmholme; Franchi and Edward

Traubner agreed to buy the estate from him and give him back an option; Franchi and Traubner agreed orally that the McCormicks would continue to live on the estate until the option expired in September 1980; Franchi hired away the caretaker who had worked for McCormick and directed the man to take orders only from Franchi; he had filed court action to evict the caretaker from the estate; and "Franchi never intended for me to buy the place back and has done everything possible to keep me busy in court so I can't raise the money." Defendants PAYTON, MURPHY, GRIFFIN and FI deny any knowledge of any meeting of shareholders or directors, minutes or any other corporate records, bank deposits, tax return filings or corporate mortgage payments. Defendant MURPHY claims that at some unknown date he transfered the stock and minute books to Defendants PAYTON and MCCORMICK. Defendant PAYTON denies

knowledge of the existence or whereabouts of records related to corporate shares or minutes. Defendant FI never attempted to enforce any rental agreement with Defendant MCCORMICK. Defendant FI never attempted to evict Defendant MCCORMICK from Farmholme. Although Defendants PAYTON, MCCORMICK and FI were subpoenaed to produce any records related to Defendant FI, they could produce none. Although Defendant MURPHY was subpoenaed to produce the certificate of incorporation, organizational meeting, stockholders agreements, stock transfer book, by-laws, minutes of directors and stockholders meetings, bankbooks, checkbooks, canceled checks, financial statements, accounts receivable and payable, leases, contracts, loan applications, bills of sale, motor vehicle registrations and state and federal income tax returns, all related to Defendant FI, he could produce none.

Defendants MURPHY, GRIFFIN, PAYTON and FI did not warn Plaintiff of the risks of dealing with Defendants MCCORMICK or FI. Defendants MURPHY, GRIFFIN, and FI did not know how Defendant FI reasonably anticipated to obtain income in order to maintain Farmholme and to make monthly mortgage payments. Defendants MURPHY, GRIFFIN, PAYTON and FI do not claim that either Defendant FI or Defendant MCCORMICK was solvent in October-November 1977, June 18, 1980 and December 19, 1983.

Neither the board of directors nor any officer authorized any person to participate in the day to day affairs of Defendant FI. No Defendant attempted to stop Defendant MCCORMICK from so participating. Defendants MURPHY, GRIFFIN, and FI took no steps to investigate the background and reputation of Defendant PAYTON.

On January 20, 1984, by Memorandum of Decision, the Court (J. Lexton) entered

judgment of evidentiary nonsuits in favor of all Defendants. Plaintiff had not yet rested.

In the Memorandum, the Court said,

> On October 25, 1977, John W.S. McCormick (hereinafter McCormick) engaged the plaintiff, Malcolm T. Arenburg (hereinafter Arenburg), to furnish materials and perform work on an estate known as Farmholme and situated in Stonington, Connecticut. . . . Arenburg did enter upon said premises and completed the work agreed upon. On November 3, 1977, he submitted an invoice in a total claim for compensation in the amount of $2,175 . . . . . When payment was not forthcoming, Arenburg contacted McCormick on numerous occasions by phone and in person, including one or two visits to Farmholme. These contracts produced only promises of imminent payment about to be made. Sixty days elapsed from the completion of the work and Arenburg did not file a mechanics' lien against the property, but continued to make periodic demands with no results. . . . At all times hereinbefore mentioned, Arenburg believed that McCormick owned Farmholme, having been told that McCormick had recently purchased the estate and intended to move in soon with his family. . . . McCormick denied making this statement, but the Court gives no credibility to his denial. The evidence is also clear

> that at all times McCormick acted as being the owner in his contacts with Arenburg, including giving the latter a grand tour of the estate. . . . At the times that Arenburg was on the premises of Farmholme, he observed other workmen doing work in preparation for occupancy of the house. It was not until the Spring of 1978, at the soonest, that Arenburg discovered that the land-record owner of the property in issue was a corporation, to wit: Farmholme, Inc. . . . Costs of this action as assessed against the plaintiff.

A motion to reopen and set aside the nonsuits having been denied, an appeal was filed on October 17, 1984. By a memorandum dated December 5, 1984, the trial court responded to a Motion for Rectification of Appeal which moved the court to further articulate the factual and legal basis for its decision. On February 4, 1986, the Appellate Court found no error in the lower court's actions. On February 18, 1986, a hearing was held on the Motion for Taxation of Costs and Counsel Fees of Defendant FI.

By letter dated February 26, 1986, the Court (J. Higgins) initiated an ex parte communication to counsel for Defendant FI about providing a bill of taxable costs and said counsel replied ex parte on March 1, 1986, by typing on the same document and enclosing the bill of costs. Counsel for Plaintiff was unaware of said documents until he received a copy of the Appellate Court printed record on August 25, 1986. By Memorandum dated April 10, 1986, the Court awarded expenses and counsel fees.

An appeal was filed on April 29, 1986. The issue in Question No. 2 herein was raised in the Appellate Court in a Preliminary Statement of Issues stating,

> did the Court violate the First and Fifth Amendments, through the Fourteenth Amendment, to the Constitution of the United States . . . when it taxed expenses in favor of Defendant FARMHOLME, INC. pursuant to P.B. Sec. 111?

Plaintiff filed a Designation of Contents

of Record which, in part, contained the following items: writ, summons, complaint and sheriff's return; amended complaint, dated November 12, 1980; suggestion of bankruptcy, filed April 6, 1981; motion to separate, dated September 22, 1981; amended complaint, dated March 30, 1982; memorandum of decision, dated January 19, 1984; motion for rectification of appeal, dated November 19, 1984; and memorandum in re: motion for rectification of appeal, dated December 5, 1984.

By memorandum dated May 21, 1986, the lower court responded to a Motion for Rectification of Appeal which moved the court to further articulate the factual and legal basis for its decision. The issue in Question No. 1 herein was raised in a Motion for Supervision of Procedure and attached Section 3098 Statement when Plaintiff moved the Appellate Court to

order the inclusion in the printed record of the aforesaid items contained in the Designation by stating that the "process which is due is stated in Secs. 3060F(a) and 3096" and further stating,

> If relevant parts of the file are not included in the printed record, particularly those items included in the Designation of Contents of Record, such exclusion is a violation of due process of law guaranteed by the 5th and 14th Amendments to the Constitution of the United States . . .

On October 16, 1986, the court denied the motion. On June 12, 1987, the Appellate Court found no error in the lower court's actions.

Reasons for Granting Writ

1. IN AN ACTION FOR CONSPIRACY, FRAUD, BREACH OF CONTRACT, QUANTUM MERUIT AND NEGLIGENCE, TRIED BEFORE A STATE REFEREE ACTING AS A COURT, THE APPELLATE COURT VIOLATED THE FIRST AND FIFTH AMENDMENTS, THROUGH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHEN

IT DENIED A MOTION TO ORDER THE INCLUSION IN THE PRINTED RECORD OF CERTAIN ITEMS CONTAINED IN A DESIGNATION OF CONTENTS OF RECORD.

Subsection 2 of P.B. Sec. 3096 authorizes the Court (through Sec. 2000) to order the clerk to print omitted portions of a record when it appears that by reason of such omission of matters of record in the trial court the questions of law in the case are not properly presented. Subsection 5 of said section authorizes the Court to order the addition to the printed record of parts of the file necessary to present correctly or fully the matters comprehended by Sec. 3060F(a). If relevant parts of the file are not included in the printed record, such exclusion in a violation of the right to petition the government and due process of law guaranteed by the 1st, 5th and 14th Amendments to the Constitution

of the United States.

On April 10, 1986, the lower court said,

> The court has reviewed the allegations against the defendant and Judge Lexton's Memorandum of Decision, dated January 19, 1984, and Memorandum In Re: Motion for Rectification of Appeal, dated December 12 /actually 5/, 1984, and finds the allegations to be without reasonable cause. Accordingly, the court awards the defendant reasonable expenses in accordance with his bill of costs of $125 and counsel fees totaling $750 ($250 for each offense).

On May 21, 1986, the lower court said,

> 1. On January 19, 1984, Judge Lexton entered a nonsuit in favor of the defendant, Farmholme, Inc., "on the ground that plaintiff was unable to produce, or even to indicate his ability to produce, any evidence on the basis of which a judgment could be rendered against the corporation."
>
> 2. On December 5, 1984, Judge Lexton in his Memorandum In Re: Motion for Rectification of Appeal held that the plaintiff presented to the court "no proof or offers of proof" to substantiate its allegations against Farmholme, Inc.

How could the very Complaint, as amended, and two Memoranda cited by the lower

court, along with the Motion for Rectification of Appeal related to one Memorandum, be irrelevant to an appeal from that court's decision? The court did not completely quote Judge Lexton's January 19, 1984, statement because Judge Lexton also said, "in light of the plaintiff's admissions as hereinbefore recited." That apparently referred to Plaintiff's admissions that he never heard of Defendant FI at the time he began dealing with Defendant MCCORMICK. The court did not accurately quote Judge Lexton's December 5, 1984, statement because what Judge Lexton actually said was,

> As to the corporation, no proof or offers of proof were tendered to the Court of agency with undisclosed principal, all as articulated in the decision.

Among the many sweeping conclusory statements made by Judge Lexton in his

original Memorandum of Law, he stated,

> It would appear that plaintiff had no probable cause to bring this action against any of the defendants on the grounds used.

The court's statement was that Plaintiff had no probable cause to "bring" this action against "any" Defendant. As that statement related to Defendant MCCORMICK, Plaintiff merely refers this Court to the Complaint, as amended, the evidence and the trial court's own earlier statement that "McCormick acted as being the owner in his contacts with Arenburg." There is little doubt that, based on Judge Lexton's own analysis, he would have entered a judgment against Defendant MCCORMICK had he not declared bankruptcy after the action was commenced. Yet the court stated that there was no probable cause to "bring" this action against "any" Defendant. Plaintiff then moved that Judge Lexton further articulate the

factual and legal basis of his decision. When so challenged by Plaintiff, he backed off from his original sweeping statement and, in his December 5, 1984, articulation, stated,

> The plaintiff lacked probable cause to bring the suit against all the defendants except the corporation and McCormick.

When that statement by the trial court who heard the evidence is compared with the second judge's conclusion, the second judge having heard no evidence or indicated any desire to hear any evidence, said statements are hopelessly in conflict. Yet the second judge made no citation whatsoever to the trial judge's contradictory conclusory statement though Plaintiff cited the second judge to that statement.

If the Complaint, as amended, Memoranda and Motion for Rectification of Appeal are not made part of the printed record,

it's as if they don't exist. Then, of course, Plaintiff cannot cite the discrepancies in the quotations and, more importantly, cannot cite the trial judge's statement which is in direct conflict with the second judge's conclusion. How can Plaintiff be afforded an effective appeal under that scenario? In addition, if the suggestion of bankruptcy and motion to separate are not made part of the printed record, Plaintiff cannot adequately explain how he proceeded against the other Defendants after Defendant MCCORMICK declared bankruptcy. By not ordering relevant parts of the file to be included in the printed record, the Appellate Court has departed from the accepted and usual course of judicial proceedings. The reference in the headnote of the Appellate Court's opinion to a prior action is quite misleading. There is no prior action.

Plaintiff is unaware of any statement of Connecticut law that taxation of costs and attorney's fees ancillary to an action is itself a separate action.

2. THE APPELLATE COURT ERRED WHEN IT FAILED TO FIND THAT THE LOWER COURT VIOLATED THE FIRST AND FIFTH AMENDMENTS, THROUGH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHEN IT TAXED EXPENSES IN FAVOR OF RESPONDENT FARMHOLME, INC. PURSUANT TO CONNECTICUT PRACTICE BOOK SEC. 111 AND CONNECTICUT GENERAL STATUTES SEC. 52-99.

The First Amendment to the United States Constitution provides for freedom of speech and the right of the people to petition the government for redress of grievances. The Fifth and Fourteenth Amendments provide that no person shall be deprived of life, liberty or property without due process of law.

The right of freedom of speech and press

includes the right to utter, print, distribute, receive and read, and freedom of inquiry, thought and to teach. Griswold v. Connecticut, 381 U.S. 479 (1965). A state college cannot restrict speech simply because it finds the views expressed by a group abhorrent. Healy v. James, 408 U.S. 169 (1972). Teachers do not shed their constitutional rights to freedom of speech and expression at the schoolhouse door. Gilbertson v. McAlister, 403 F. Supp. 1 (D. Ct. 1975). Likewise, a party petitioning the court for a redress of grievances does not lose his freedom of speech and expression at the courthouse door simply because the court finds the views expressed by the party to be abhorrent. The rule should be no different when the court's interests are at issue rather than that of a state college or another school. A state, by denying freedom of thought

and speech, denies due process of law. Palko v. Connecticut, 302 U.S. 319 (1937). The right to petition the government, under the First Amendment, is binding on the states. Moffett v. Killian, 360 F. Supp. 228 (D. Ct. 1973). The right of effective access to the courts is protected by the First and Fourteenth Amendments. Stover v. Carlson, 413 F. Supp. 718 (D. Ct. 1976). Courts are always open for redress of injury to a person or property. Ellis v. Emhart Mfg. Co., 150 Conn. 501, 191 A.2d 546 (1963). The phrase "right of action" includes the right to commence and maintain an action. Pickett v. Ruickoldt, 91 Conn. 680, 101 A. 82 (1917). A party to be affected by a judgment must have his day in court or an opportunity to be heard. Freedman v. Centre Shopping Plaza, Inc., 21 Conn. Supp. 156, 148 A.2d 667 (1959). Due

process of law means such an exertion of powers of government as settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. John J. McCarthy Co. v. Alsop, 122 Conn. 228, 189 A. 464 (1937). The constitutional right to redress in the courts must remain inviolate. Gentile v. Altermatt, 169 Conn. 267, 363 A.2d 1 (1975).

P.B. Sec. 111 and C.G.S. Sec. 52-99 have three requirements for the taxation of extraordinary costs. They are: (1) an allegation be made without reasonable cause; (2) such allegation be found untrue; and (3) reasonable expenses be necessarily incurred by the other party by reason of such untrue pleading.

When measured against the above analysis, P.B. Sec. 111 and C.G.S. Sec. 52-99, if

they are not unconstitutional on their face (and Plaintiff claims that they are), were clearly unconstitutionally applied by the court in this case in violation of the provisions of the Constitution of the United States previously cited. A ruling such as was made here clearly has a chilling effect on the exercise of the right of free speech and to petition the government and the other rights stated under the constitution. 28 U.S.C. Sec. 2403(b) may be applicable.

It is bad enough for a litigant to lose in judicial proceedings. P.B. Sec. 111 and C.G.S. Sec. 52-99 can then be used to kick him in the face when he is down. Assuming that sovereign immunity would not be applicable, does this mean that requirements similar to P.B. Sec. 111 and C.G.S. Sec. 52-99 could be used against the United States when the United

States Attorney for the State of Louisiana loses a case against Governor Edwin Edwards, or could those sections be used to penalize the State of Rhode Island when the Attorney General there loses a case against Ralph Richards?

Absolute privilege to make defamatory statements exists in judicial proceedings. Hassett v. Carroll, 85 Conn. 23, 81 A. 1013 (1911). In Irwin v. Cohen, 40 Conn. Supp. 259, 490 A.2d 552 (1985), the court stated:

> The privilege is '. . . founded on public policy, which requires that a judge in dealing with the matter before him, a party preparing or resisting a legal proceeding, and a witness in giving evidence in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.' . . .
>
> . . . In deciding whether an absolute privilege exists, courts determine whether the alleged defamatory statements are sufficiently preliminary to, or during the course of a proposed or continuing judicial proceeding.

Words alleged to be slanderous having been spoken before a committee of aldermen investigating charges against the board of public works, a defendant was entitled to an instruction that, as a citizen of the city, he had a right to go before the committee and to tell what he knew of the matters in hand. Blakeslee v. Carroll, 64 Conn. 223, 29 A. 473 (1894). There appears to be no good reason to award extraordinary costs against a party in the case at hand, when that party would be shielded in a subsequent defamation action from award of damages to the same person for the same statement.

Statements made in a motion for disqualification, if they are pertinent and germane to the motion, are phrased in a proper and respectful manner and are honestly and reasonably believed to be true by the draftsman, are not a contempt

of court, even though they may necessarily, in certain situations, reflect adversely upon the conduct or character of the judge. Whiteside v. State, 148 Conn. 77, 167 A.2d 450 (1961). In State v. Anonymous, 31 Conn.Supp. 179, 326 A.2d 837 (1974), the Court stated:

> Good faith pleading requires that counsel must not allege claims of fact which he has no reasonable grounds to assert and cannot prove. Of course, merely because a fact alleged is not ultimately proved to the court's satisfaction is not, standing alone, the test of good faith, because in every case many facts ultimately are not proved. The failure to prove the alleged fact is an important factor, but it must be judged in the light of all the circumstances existing at the time the pleading is filed or the oral representation is made to the court. If under all such circumstances counsel then has reasonable grounds to file the pleading or make the representation, he cannot later be faulted for his failure to satisfy his burden of proof. But, on the other hand, if the pleading or oral representation when made is without any reasonable basis and is designed merely to embarrass or to inject immaterial or irrelevant matters into the case for the sake of publicity or some other ill-

> conceived or improper motives, such a pleading or oral representation would clearly be subject to disciplinary action.

In Dreier v. Upjohn Co., 196 Conn. 242, 492 A.2d 164 (1985), the court stated:

> it would be an abuse . . . for a plaintiff to make an assertion in a complaint that he does not reasonably believe to be the truth.

Notwithstanding the pronouncements of any third person, Plaintiff remains firmly convinced that he was "ripped off" as a result of the concerted activities of Defendants herein. The fact is that the formation of Defendant FI and the purchase of Farmholme under "fraudulent or suspicious" circumstances were necessary elements in allowing Defendant MCCORMICK to present himself in a false light as a wealthy baron of the manor which, in turn, induced Plaintiff to contract with Defendant MCCORMICK. The "reasonable cause" requirements of P.B. Sec. 111 and C.G.S. Sec. 52-99 are

likely less stringent requirements than than that for "probable cause" in actions for vexatious suit. However, there are probably enough similarities for some comparisons to be useful. Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. Its existence or non-existence is determined by the court on the facts found. Cosgrove Development Co. v. Cafferty, 179 Conn. 670, 427 A.2d 841 (1980).

The burden of proof on the Motion for Taxation was on Defendant FI. Yet said Defendant did not introduce one shred of evidence in support of its motion nor did it cite even one specific fact which it claimed was untrue and made without reasonable cause. In its Memorandum of Decision on the motion, the court made no findings of fact and one conclusion of

law.

Judge Higgins, without stating a single finding of underlying fact in support of his conclusion of law, even after being requested to further articulate his decision, found the allegations against Defendant FI to be without reasonable cause. The accepted and usual course of judicial proceedings is for a court to make findings of fact and conclusions of law. Yet this was not done here. The Appellate Court has sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings. Statements by Judge Lexton were negative in character, speaking of being unable to produce proof or offers of proof. At no time did Judge Lexton or Judge Higgins ever make any affirmative findings as to the untruth of any allegation contained in the Complaint, as amended. It does not follow that lack of proof concerning an

allegation means that allegation is untrue.

The court awarded Defendant FI reasonable expenses of $125.00. Yet Defendant FI, which had the burden of proof, submitted not one shred of evidence to establish any amount of expenses of any sort. In the absence of any such evidence, there is no basis for the award of any expenses to Defendant FI. Since the amount in demand in the Complaint is less than $7,500, subsection (c) of C.G.S. Sec. 52-257 allows a total of $25.00 by way of indemnity.

The court awarded counsel fees totaling $750.00 ($250.00 for each offense). Although asked to further articulate the basis for its decision, the court said nothing further about counsel fees. Since there were three counts to the Complaint, as amended, Plaintiff reasonably assumes that the court awarded

$250.00 for each count. Plaintiff submits that no counsel fees are awardable at all. However, if counsel fees are awardable, Plaintiff submits the following.

The only difference between the First Count and the Second Count of the Complaint dated June 18, 1980 and Amended Complaint dated November 12, 1980 was that Paragraph 10 of the First Count, making certain allegations against the individual Defendants, was eliminated from the Second Count. In all other respects, the two counts are virtually identical. The repetitive nature of the allegations as they relate to Defendant FI in the First and Second Counts hardly justifies separate awards of counsel fees when nothing new was added as to Defendant FI from the First Count to the Second. C.G.S. Sec. 52-99 limits taxation of counsel fees to $10.00 for each offense.

The issues related to P.B. Sec. 111 and C.G.S. Sec. 52-99 are different from those related to the merits of the action. Therefore, findings of fact related to the requirements of P.B. Sec. 111 and C.G.S. Sec. 52-99 are not necessarily the same as those related to the merits of the action.

A court deciding issues related to P.B. Sec. 111 and C.G.S. Sec. 52-99 should not limit itself to the findings of fact earlier made. Even those findings should not have res judicata effect since Plaintiff had never rested and was not allowed to complete his case in chief and, therefore, the case was never fully heard on the merits.

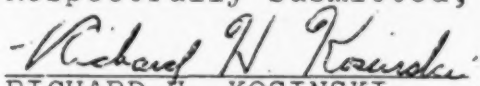
Plaintiff requested Judge Higgins to examine the entire record: the exhibits, the transcripts, all of the pleadings. Defendant FI stated that the Motion for Taxation could be decided on the basis of

either the trial court's memorandum or the Appellate Court decision. A decision on that basis was error.

Conclusion

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



RICHARD H. KOSINSKI

Counsel for Petitioner

106 Farmington Avenue

New Britain, CT 06053

Dated:

October 22, 1987

Appendix

MALCOLM T. ARENBURG, JR.

v. FARMHOLME, INC., ET AL.

(5091)

DUPONT, C.J., BORDEN and BIELUCH, Js.

Argued June 11--decision

released June 12, 1987

Motion by the named defendant for taxation of costs and attorney's fees incurred in a prior action in which the plaintiff was nonsuited, brought to the Superior Court in the judicial district of Hartford-New Britain at New Britain and tried to the court, Higgins, J.; judgment awarding costs and attorney's fees to the named defendant, from which the plaintiff appealed to this court. No error.

Richard H. Kosinski, for the appellant (plaintiff).

Raphael Korff, for the appellee (named defendant).

PER CURIAM. There is no error.

NO. 403891

MALCOLM T. ARENBURG	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT NEW BRITAIN
FARMHOLME, INC., ET AL	:	JANUARY 19, 1984

MEMORANDUM OF DECISION

This is essentially a simple collection case involving $2,175, plus such costs and interest as may be granted in connection therewith. The facts relevant to that simple issue are not in dispute and are as follows:

On October 25, 1977, John W.S. McCormick (hereinafter McCormick) engaged the plaintiff, Malcolm T. Arenburg (hereinafter Arenburg), to furnish materials and perform work on an estate known as Farmholme and situated in Stonington, Connecticut. Plaintiff's Exhibits C and D.

Arenburg did enter upon said premises and completed the work agreed upon. On November 3, 1977, he submitted an invoice in a total claim for compensation in the amount of $2,175. Plaintiff's Exhibit E. When payment was not forthcoming, Arenburg contacted McCormick on numerous occasions by phone and in person, including one or two visits to Farmholme. These contacts produced only promises of imminent payment about to be made. Sixty days elapsed from the completion of the work and Arenburg did not file a mechanics' lien against the property, but continued to make periodic demands with no results. Transcript, Arenburg, pp. 14 and 32.

At all times hereinbefore mentioned, Arenburg believed that McCormick owned Farmholme, having been told that McCormick had recently purchased the estate and intended to move in soon with his family. Transcript, Arenburg, p.12. McCormick

denied making this statement, but the Court gives no credibility to his denial. The evidence is also clear that at all times McCormick acted as being the owner in his contacts with Arenburg, including giving the latter a grand tour of the estate. At the times that Arenburg was on the premises of Farmholme, he observed other workmen doing work in preparation for occupancy of the house. It was not until the Spring of 1978, at the soonest, that Arenburg discovered that the land-record owner of the property in issue was a corporation, to wit: Farmholme, Inc. Transcript, Arenburg, p. 16.

Even after he learned that McCormick was not the owner of Farmholme, Arenburg continued to look to him personally for payment. Defendants' Exhibits 1 and 2. Arenburg also admitted that at no time did McCormick claim to be acting in any other capacity but his own, and that he did

business only with McCormick and no other defendant. Transcript, Arenburg, pp. 22, 23, 29 and 33.

As late as June 3, 1980, Arenburg looked to McCormick for payment (see defendants' Exhibit 2), yet on July 14, 1980, he filed the present action against all the other named defendants as well, on grounds of civil conspiracy to defraud Arenburg by participating in the creation and maintenance of what he charges was a "phony corporation."

Without detailing specific case law, the following principles of law are applicable to civil conspiracy:

1. The primary purpose of a civil conspiracy must be to cause injury to another. So long as the parties seek only to further their own fair interest, they will not be liable for any incidental damage to another.

2. The cause of action is not created by

the conspiracy, but by the wrongful acts done by the defendants to the injury of the plaintiff.

No cause of action can exist in the absence of an overt act. An unexecuted conspiracy does not impose civil liability.

3. A party is not responsible for the result of a conspiracy unless he actually participates or aids or abets it in some way, and the mere acquiscence or watching others conspire is not sufficient. This would include a loss resulting from a conspiracy to misrepresent the financial condition of a corporation.

These are merely generalities in the area of law of civil conspiracy, but they set the parameters within which proof must be forthcoming.

There is no dispute that the certificate of incorporation of Farmholme, Inc., was filed with the Secretary of State's

Office, along with the Appointment of Agent for Service and the Report of Organization. Five thousand shares of $1 par value was authorized and the amount of capital with which the corporation was to begin was set at $1,000. The date of this filing was June 29, 1977, four months prior to the date of the contracts which McCormick executed on his own behalf with Arenburg.

There likewise no dispute that the primary purpose for the creation of said corporation was for it to acquire ownership of Farmholme Estate, which it did by deed dated June 30, 1977, and recorded in the Stonington Land Records in Volume 215, Pages 223-226. Plaintiff's Exhibit F.

On June 30, 1977, in connection with said purchase, Farmholme, Inc., obligated itself to the extent of $240,000 by way of a mortgage note, backed by a mortgage

deed on record in the Stonington Land Records in Volume 215, Pages 227-231, Plaintiff's Exhibit G, and a second mortgage note to the extent of $40,000, backed by a mortgage deed on record in said Land Records in Volume 215, Pages 232-236. Plaintiff's Exhibit H.

All these transactions took place on June 30, 1977, and were a matter of public record available to Arenburg prior to his getting involved with McCormick and executing the two contracts in issue on October 25, 1977. Arenburg made no inquiry, but accepted as fact whatever McCormick stated.

Farmholme, Inc., sold Farmholme Estate on September 6, 1979, by deed recorded in Volume 224, Pages 441-444, of the Stonington Land Records, almost two years after the work on the house was completed by Arenburg. Plaintiff's Exhibit Y.

In that interval period, Arenburg did not

file a mechanics' lien, made no representations to or demands of Farmholme, Inc., for payment or place it on notice that he was looking to it for payment, although he knew not later than the Spring of 1978 that the Corporation was the owner of the land. On the contrary, as late as June 3, 1980, he still looked to McCormick for payment. Defendants' Exhibit 2.

It was not until Arenburg brought suit on July 14, 1980, that for the first time the defendants, other than McCormick, became parties to the action. The motivation is clear, to wit: McCormick went bankrupt and Farmholme, Inc., for all practical purposes, is a defunct corporation.

After Arenburg learned that Farmholme, Inc., and not McCormick, was the owner of the property, he took no action against the corporation on any ground

even though the property was available for attachment. Arenburg did not oppose McCormick in his bankruptcy action, did not set up the charge of fraud in McCormick's bankruptcy proceedings, did not claim that the Corporation was merely a "front" for McCormick and that the Corporation's assets in fact belonged to McCormick.

Arenburg now comes to this Court claiming damages from the attorney who drew up the papers creating the corporation, the secretary who typed them, both of whom also became nominal officers of the corporation for the purposes of organization, and from the individual who was designated president for purposes of perfecting the organization of the corporation.

There were imperfections in the annual reporting required by the Secretary of State's Office, imperfections in the

formalities of issuing the stock and whatever, but the hard fact remains that none of those things were relevant to any of Arenburg's business activity with McCormick, all as hereinbefore recited. In addition, as hereinbefore stated, he did not avail himself of any of the remedies that were open to him prior to the bringing of this action. The importance of this point is that it puts his good faith in this action into question.

Arenburg literally innundated this Court with documentary evidence which he claimed would prove the alleged conspiracy. Most of the documents, taken singly or in concert, were on the fact of it irrelevant to the issues before the Court. Many facts that were not in dispute or even were admitted were being proven by documents. Transcripts from other trials in which McCormick was

involved, but having no relevancy to the issues in this case, were procured, and attempts were made to introduce them into evidence. Indicative of the extent of what can be labeled as a "fishing expedition," a bill of costs (plaintiff's Exhibit J marked for identification) shows an expenditure of $1,027 so far on service of process, certified copies, toll calls and the like, a cost which is 50 percent of the original bill for the work done.

The trial began to take on an exercise in futility. The Court then asked the plaintiff's counsel to indicate what his offers of proof were going to be with respect to defendants Murphy and Debra Griffin, which would bring the case against them within the parameters of the law of civil conspiracy. The plaintiff's attorney failed to satisfy the Court on that point. Dismissals were then entered

as to them.

The Court then recessed the trial and gave plaintiff's counsel until December 1, 1983, to request a hearing to show cause why a dismissal should likewise not be granted as against the defendant, Payton. Such a hearing was held on December 19, 1983, and a full transcript is available in the file.

A review of the indicated offers of proof, taken in the context of the undisputed facts hereinbefore recited, clearly indicates no relevancy to the issue of civil conspiracy. It would have been more relevant in fighting McCormick's discharge in bankruptcy.

The bottom line of the plaintiff's indicated offers of proof, insofar as all defendants other than McCormick and Farmholme, Inc., are concerned, that the mere creation and maintenance of said corporation was a fraud upon any future

creditor, irrespective of whether he took the ordinary and customary precutions to protect his interests, and any person who participated in its creation and maintenance, was guilty of civil conspiracy to defraud such creditor.

It would appear that the plaintiff had no probable cause to bring this action against any of the defendants on the grounds used.

DECISION

Judgments of non-suit are entered in favor of the defendants, Debra J. Griffin, aka Debra J. Saucier, Lewis J. Payton, and Albert G. Murphy, on grounds that plaintiff was unable to produce, or even to indicate his ability to produce, any evidence relevant to the issue of civil conspiracy.

Judgment of non-suit is entered in favor of the defendant Farmholme, Inc., on grounds that the plaintiff was unable to

produce, or even to indicate his ability to produce, any evidence on the basis of which a judgment could be rendered against the corporation in the light of the plaintiff's admissions as hereinbefore recited.

Judgment of non-suit is entered in favor of the defendant, John W. McCormick, on grounds of the admitted fact that he was adjudicated a bankrupt in which the plaintiff's claim was listed and this court has no jurisdiction over the matter.

Costs of this action are assessed against the plaintiff.

ROMAN J. LEXTON
STATE TRIAL REFEREE

NO. AC-3630

(NO. 403891)

MALCOLM T. ARENBURG	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT NEW BRITAIN
FARMHOLME, INC., ET AL	:	DECEMBER 5, 1984

MEMORANDUM IN RE: MOTION FOR RECTIFICATION OF APPEAL

All the so-called "admitted or undisputed facts" listed at great length by the plaintiff in his motion are a matter of record and are, or should be, before the Appellate Court as part of his appeal. There is nothing for this Court to rectify.

This Court had filed its decision in the form of a ten-page memorandum, fully, completely and with specificity, articulating the basis of its decision.

A copy is attached for convenience and reference.

In relation to the legal issues before the Court, most, if not all, the documentary evidence introduced or being offered as evidence was irrevelent and immaterial and of no probative value, individually or taken as a whole.

The plaintiff lacked probable cause to bring the suit against all the defendants except the corporation and McCormick. As to the corporation, no proof or offers of proof were tendered to the Court of agency with undisclosed principal, all as articulated in the decision. As to defendant, McCormick, the plaintiff should have raised any and all issues in the bankruptcy proceedings.

The motion is denied.

ROMAN J. LEXTON

STATE TRIAL REFEREE

MALCOLM T. ARENBURG, JR.

v. FARMHOLME, INC., ET AL.

(3630)

DUPONT, C.J., BORDEN and BIELUCH, Js.

Argued January 10--decision

released February 4, 1986

Action to recover damages for services rendered, brought to the Superior Court in the judicial district of Hartford-New Britain at New Britain and referred to Hon. Roman J. Lexton, state trial referee; judgment of nonsuit in favor of the defendants, from which the plaintiff appealed to this court. No error.

Richard H. Kosinski, for the appellant (plaintiff).

Raphael Korff, for the appellee (named defendant).

Robert Shluger, for the appellee (defendant Lewis J. Payton).

Armand A. Korzenik, with whom was Albert G. Murphy, for the appellees (defendant

Debra Griffin et al.).

PER CURIAM. There is no error.

NO. 403891

MALCOLM T. ARENBURG	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT NEW BRITAIN
FARMHOLME, INC., ET AL	:	APRIL 10, 1986

MEMORANDUM OF DECISION ON DEFENDANT, FARMHOLME, INC.'S, MOTION FOR TAXATION OF COSTS

This matter comes before the court on defendant, Farmholme, Inc.'s, motion for taxation of costs under Conn. Practice Book Sec. 111. The court has reviewed the allegations against the defendant and Judge Lexton's Memorandum of Decision, dated January 19, 1984, and Memorandum In Re: Motion for Rectification of Appeal,

dated December 12 /sic/, 1984, and finds the allegations to be without reasonable cause.

Accordingly, the court awards the defendant reasonable expenses in accordance with his bill of costs of $125 and counsel fees totaling $750 ($250 for each offense).

HIGGINS, J.

A.C. 5091

No. 403891

MALCOLM T. ARENBURG	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT NEW BRITAIN
FARMHOLME, INC., ET AL	:	MAY 21, 1986

MEMORANDUM OF DECISION ON MOTION FOR RECTIFICATION OF APPEAL

Plaintiff, Malcolm T. Arenburg, Jr.,

requests this court to articulate the basis of its decision dated April 10, 1986, under Conn. Practice Bk. Sec. 3060D, Sec. 3082 and Sec. 3096.

This court makes the following findings:

1. On January 19, 1984, Judge Lexton entered a nonsuit in favor of the defendant, Farmholme, Inc., "on the ground that plaintiff was unable to produce, or even to indicate his ability to produce, any evidence on the basis of which a judgment could be rendered against the corporation."

2. On December 5, 1984, Judge Lexton in his Memorandum In Re: Motion for Rectification of Appeal held that the plaintiff presented to the court "no proof or offers of proof" to substantiate its allegations against Farmholme, Inc.

HIGGINS, J.

STATE OF CONNECTICUT

APPELLATE COURT

NO. A.C. 5091

MALCOLM T. ARENBURG,

JR.

VS : OCTOBER 16, 1986

FARMHOLME, INC.

ORDER

The motion of the Plaintiff, filed September 2, 1986, for supervision of procedure, having been presented to the Court, it is hereby

ORDERED Denied.

BY THE COURT,

MICHELE L'ANGERS

ASSISTANT CLERK-

APPELLATE

The judgment or decree sought to be reviewed, rendered on June 12, 1987, is found on Appendix page A1.

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-86-1010

Malcolm T. Arenburg, Jr.

v.

Farmholme, Inc., et al.

ORDER ON PETITION FOR

CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiff for certification to appeal from the Appellate Court (11 Conn. App. 810) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

CYNTHIA M. GWOREK

ASSISTANT CLERK-

APPELLATE

Dated: July 30, 1987

Constitution of United States

. . .

Amendment I

. . .

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

. . .

Amendment V

. . .

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

. . .

Amendment XIV

. . .

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Sec. 52-99. Untrue allegations or denials; costs

Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading; provided no expenses for counsel fees shall be taxed exceeding ten dollars for any one offense.

Sec. 52-257. Fees of parties in civil actions

(a) The fees of parties in civil actions in which the matter in demand is not less than fifteen thousand dollars shall be: For each complaint, exclusive of signing and bond, five dollars for the first page and, for each succeeding page, two dollars; for each judgment file, two

dollars for the first page and, for each additional page, one dollar and fifty cents. The prevailing party in any such civil action shall receive, by way of indemnity, the following sums: (1) For all proceedings before trial, fifty dollars; (2) for the trial of an issue of law or fact, seventy-five dollars, but if more than one issue of fact is tried at one time, only one trial fee shall be allowed; and (3) in difficult or extraordinary cases in the superior court, where a defense has been interposed, a further allowance, in the discretion of the court, not to exceed two hundred dollars.

. . .

(c) In all civil actions in which the matter in demand is less than fifteen thousand dollars, the prevailing party shall receive, by way of indemnity, the following sums: (1) For all proceedings

before trial, ten dollars: and (2) for the trial of an issue of fact or law, fifteen dollars, but, if more than one issue of fact or law is tried at one time, only one trial fee shall be allowed.

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Sec. 111. General Rules of Pleading--Untrue Allegations or Denials

Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading; provided no expenses for counsel fees shall be taxed exceeding $250 for any one offense. Such expenses shall be taxed against the offending party whether he prevails in the action or not.

Sec. 2000. Applicable Sections of Supreme Court Rules

The practice and procedure for appeals to the appellate court shall conform to the rules of practice governing appeals to the supreme court except where a particular practice or procedure is specified by the rules of the appellate court. . . .

Sec. 3060F. Appellant's Brief; Form

The appellant's brief shall contain the following:

(a) A concise statement setting forth, in separately numbered paragraphs, without detail or discussion, the principal issue or issues involved in the appeal, with appropriate references to the page or pages of the brief where the issue is discussed, pursuant to subsection (d) hereof. . . .

Sec. 3096. Supervision of Procedure

The supervision and control of the

proceedings on appeal shall be in the supreme court from the time the appeal is filed, or earlier, if appropriate, and, except as otherwise provided in these rules, any motion the purpose of which is to complete, correct or otherwise perfect the record for presentation to the supreme court shall be made to it. The court may, on its own motion, modify or vacate any order made by the trial court, or a judge thereof, in relation to the prosecution of the appeal. It may also, for example, on its own motion or upon the motion of any party, . . . (2) when it appears that by reason of omission from the printed record of matters of record in the trial court the questions of law in the case are not properly presented, order the clerk to print the portions so omitted; . . . (5) order the addition to the printed record of parts of the file necessary to present

correctly or fully the matters comprehended by Secs. 3060F(a) . . .